No. 11653

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR SCHATTE, RAYMOND E. CONAWAY, ANDREW M. ANDERSON, CHARLES L. DAVIS, HARRY BEAL, ARTHUR DJERF, EWALD K. ALBRECHT, HARRY L. TALLEY, HARRY DAVIDSON, JOHN L. KIERSTEAD, THOMAS W. HILL, LLOYD C. JACKSON, ALFRED J. WITHERS, JOHN H. ZELL, and EDWARD DERHAM, on Behalf of Themselves and All Others Similarly Situated,

Appellants,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, *et al.,*

Appellees.

Answering Brief of Appellees International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, and Richard F. Walsh, and Roy M. Brewer.

BODKIN, BRESLIN & LUDDY,
HENRY G. BODKIN,
GEORGE M. BRESLIN,
MICHAEL G. LUDDY,
PETER E. GIANNINI,
1225 Citizens National Bank Building, Los Angeles 13,
Attorneys for Said Appellees.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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To the United States Circuit Court of Appeals, in and for the Ninth Circuit, and to the Honorable Justices Thereof:

Respondents respectfully submit to this Honorable Court that the decision of the District Court of the United States, Southern District of California, Central Division, No. 6063BH Civil, dismissing the amended complaint of the appellants and rendering judgment of dismissal on January 27, 1947, on the ground that that Court lacked jurisdiction, was entirely without error, and followed sound and well settled legal principals.

STATEMENT OF FACTS.

There appears from the amended complaint, when the amazing number of legal conclusions therein are disregarded, that a jurisdictional controversy existed between the United Brotherhood of Carpenters and Joiners of America (Carpenters), of which appellants are members and of which the persons whom they purport to represent in this action are likewise members, and the appellee, International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada [Amended Compl., par. XII, Tr. p. 8], hereinafter referred to as the "International Alliance." Each organization claimed jurisdiction of the erection of sets in the Hollywood studios. [*Ibid.* pars. XXIII, XXIV, XXV, Tr. pp. 14-17.] In 1945, and again in 1946, the organization, of which plaintiffs are members, and the persons whom they claim to represent in this action engaged in a jurisdictional strike. [*Ibid.* par XIX, Tr. pp. 12-13; *Ibid.* par. XX, Tr. p. 13.] The strike in 1945 was terminated by an agreement referred to in the amended complaint as the "Cincinnati Agreement." [*Ibid.* par. XX, Tr. p. 13.] By its terms the jurisdictional controversy in the Hollywood studios was submitted to arbitration to a three-man committee appointed by the Executive Council of the American Federation of Labor, and consisting of three vice-presidents thereof. [*Ibid.* par. XXII, Tr. p. 14.] It was agreed by all parties thereto—the Motion Picture Companies and the International Labor organizations involved—that the decision of this committee should be "final and binding." [*Ibid.* par. XIX, Tr. pp. 12-13.] By the terms of the committee's decision [Exhibit "D" attached to the amended complaint], some of the labor organizations both won and lost certain jurisdiction.

and others lost without winning jurisdiction. Jurisdiction over the erection of sets was awarded to the appellee, International Alliance. [*Ibid.* par. XXIII, Tr. pp. 14-15.] The award went into effect in January, 1946. Ever since that time the International Alliance has had and now exercises jurisdiction over the erection of sets. [*Ibid.* pars. XXIV, XXV, XXVI, Tr. p. 16-17.] The carpenters and the appellants speaking for them, claim that the committee in August, 1946, issued a "Clarification Statement" by the terms of which jurisdiction of erection of sets was given to the carpenters. [*Ibid.* par. XXVII, Tr. pp. 17-18.] The foregoing matters are related in the allegations of appellants' alleged first cause of action. The sole additional elements added by the second cause of action so called, of appellants, are allegations to the effect that the appellee, Motion Picture Companies and the appellee, Producers Companies entered into a "conspiracy" to deprive appellants of their jobs. That alleged cause of action reveals further that the genuineness of the so-called clarification statement is in dispute. [*Ibid.* par. VII, Tr. pp. 25-26.]

Accordingly, the sole controversy set forth in the amended complaint is a jurisdictional dispute between two labor organizations arising out of a series of contracts, awards and decisions. In the language of Paragraph XII of the amended complaint itself,

> "The controversy alleged herein involves the allocation of labor to be performed for defendant Motion Picture Companies by members of respective defendant unions under the terms and provisions of contracts entered into and executed by and with said company defendants and defendant Producers Association, and under agreements and decisions, findings and

awards heretofore arrived at in pursuance to arbitration agreements made and entered into by all defendants herein."

In the further language of the lower court,

> "The forty-eight page complaint when analyzed presents nothing more or less than a request that this court interpret a private contract or agreement allocating certain work on stage sets in the moving picture industry. As stated by counsel in oral argument, the difference between the parties is simply who is 'to drive the nails.' The serious question before the court is whether this court has jurisdiction in the absence of diversity of citizenship." [Tr. p. 122.]

The amended complaint fails to allege diversity of citizenship, and affirmatively reveals that such diversity did not exist. The appellants contended below, however, that despite such lack of diversity of citizenship,

> "Jurisdiction of this Court is vested by virtue of Sec. 400, Title 28, United States Code Annotated; Sec. 41(1), 41(8), 41(12), and 41(14), Title 28, United States Code Annotated; Sec. 729, Title 28, United States Code Annotated; Sections 43 and 47 (3), Title 8, United States Code Annotated; Sec. 157, Title 29, United States Code Annotated; and the Constitution of the United States, Amendments V and XIV." [See Amended Complaint, par. VIII, Tr. p. 7.]

Appellees filed motions to dismiss below, and voluminous Points and Authorities with respect to those motions were filed, both by respondents and appellants. On February 25, 1947, the Honorable Ben Harrison rendered judgment of dismissal on the ground that the court lacked jurisdiction, and filed its opinion reported in 70 Fed. Supp. 1008. [Tr. p. 122.] This appeal is taken by appellants from that judgment.

I.

Jurisdiction Was Not Conferred Upon the District Court Either by the V or the XIV Amendment to the Federal Constitution Nor by the Civil Rights Statutes Enacted Pursuant to the XIV Amendment, for Those Amendments Are Applicable Solely to Federal and State Action, Respectively.

Authorities:

Corrigan v. Buckley, 271 U. S. 323, 330;

Nissen v. International Brotherhood of Teamsters, etc., et al., 229 Iowa 1028, 296 N. W. 848, 141 A. L. R. 598, 614;

The Civil Rights Cases, 100 U. S. 313;

Virginia v. Rives, 100 U. S. 313;

U. S. v. Harris, 106 U. S. 629, 639;

Section 43, Title 8, U. S. C. A.;

Section 41(14), Title 28, U. S. C. A.;

Section 729, Title 28, U. S. C. A.;

California Oil & Gas Co. v. Miller, 96 Fed. 12, 22;

Section 47(3), Title 8, U. S. C. A.;

Section 41(12), Title 28, U. S. C. A.;

Love v. Chandler, 124 F. (2d) 785, 786, 787;

Simpson v. Geary, 204 Fed. 507;

Mitchell v. Greenough (C. C. A. 9), 100 F. (2d) 184, 187;

Bartling v. C. I. O., 40 F. Supp. 366, 368;

Love v. United States, 108 F. (2d) 43;

Green v. Elbert, et al., 63 Fed. 308, 309;

Brents v. Stone, et al., 60 F. Supp. 82, 84;

Emmons v. Smitt, et al., 58 F. Supp. 869, 873, 874, 876;

Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324, 1327.

A. The Fifth Amendment to the Federal Constitution Is Applicable Solely to Federal Action.

Appellants first contend on page 30 of their opening brief that the complaint herein alleges facts constituting a violation of the Fifth Amendment to the Federal Constitution. With respect to that Amendment, however, it has long been settled that it is a limitation only upon the Federal government and does not limit individual action. In the language of *Corrigan v. Buckley,* 271 U. S. 323, 330:

> "The Fifth Amendment 'is a limitation only upon the powers of the general government,' *Talton v. Mayes,* 163 U. S. 376, 382, 41 L. Ed. 196, 198, 16 Sup. Ct. Rep. 986, and is not directed against the action of individuals."

The sole case relied upon by appellants in support of their contention that the allegations to the complaint are sufficient to show a violation of the Fifth Amendment to the Federal Constitution is *Nissen v. International Brotherhood of Teamsters, etc., et al.,* 229 Iowa 1028, 296 N. W. 858, 141 A. L. R. 598, 614. The *Nissen* case, however, concerns a proceeding by an expelled mem-

ber of a labor organization. Language quoted from that opinion at page 30 of appellants' opening brief upon which appellants rely in making the foregoing contention is of little authority in view of the rule to the contrary well established by decisions of the United States Supreme Court.

B. The Fourteenth Amendment to the Federal Constitution Likewise Applies Solely to State Action.

On page 48 of their opening brief, the Fourteenth Amendment to the Federal Constitution is also relied upon by appellants. It was early settled in *The Civil Rights Cases,* 109 U. S. 3, however, that the Fourteenth Amendment did not apply to individual action, but applied solely to State Action. In the language of the United States Supreme Court in that decision,

> "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment . . ."

Similarly, in *Virginia v. Rives,* 100 U. S. 313, in referring to Section 1 of the 14th Amendment the court stated at page 318 that

> "The provisions of the 14th Amendment of the Constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals."

See, also:

U. S. v. Harris, 106 U. S. 629, 639.

The complaint here under consideration, does not in any manner, of course, suggest the presence of State Action.

C. The Civil Rights Statutes Enacted After the Civil War to Enforce the Provisions of the Fourteenth Amendment Apply to State Action Solely, or to Action Done Under Color of State Law.

(1) Section 43 of Title 8, U. S. C. A. by Express Provision Is Limited to Action Under Color of State Law.

In Paragraph VIII of their complaint, appellants allege that, among other provisions, "Jurisdiction of this Court is vested by virtue of . . . Section 43 . . . Title 8, United States Code Annotated." That provision is as follows:

> *"Civil action for deprivation of rights.* Every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory,* subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress: R. S. 1979."

There is not the slightest intimation in the amended complaint or elsewhere, however, that appellees or any of them acted under color of state law. In the language of *California Oil & Gas Co. v. Miller*, 96 Fed. 12, 22,

> "The liability declared in said section 1979, 8 U. S. C. A. 43 for depriving a person of rights, privileges, or immunities secured by the constitution and laws of the United States manifestly depends upon the fact that such deprivation be under color of some statute, ordinance, etc., of a state or territory; and

therefore, to constitute a cause of action under said section, the plaintiff must show, as part of his case, that the defendant claims to act under color of a statute, ordinance, etc., of a state or territory."

(2) Section 47(3) of Title 8, United States Code Annotated, Likewise Applies Only to State Action, as Contrasted to Individual Action.

Appellants contend further that jurisdiction was vested in the lower court by virtue of Section 47(3), Title 8, United States Code Annotated, and Section 41(12), Title 28, U. S. C. A. (See Op. Br. pp. 4-5.)

Section 41(12), Title 28, gives jurisdiction to the Federal District Courts:

> "Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in Section 47 of Title 8."

The foregoing statutes, however, were passed shortly after the Civil War and has been construed, as was the Fourteenth Amendment, to provide for redress against State action and not against the invasion of private rights by individuals. These principles and the authorities establishing them are summarized in *Love v. Chandler,* 124 F. (2d) 785 at 786-787:

> "The appellant contends that his complaint states a claim under Sec. 47(2) and (3) of Title 8, U. S. C. A., authorizing actions for damages for con-

spiracies to deprive citizens of the equal protection of the laws or from exercising any right or privilege as a citizen of the United States, and that it also states a claim under Sec. 48 of Title 8, U. S. C. A., which authorizes the recovery of damages from any person who, having knowledge of such a conspiracy and the power to prevent it, neglects or refuses so to do. The appellant further contends that the trial court had jurisdiction of the subject matter of this action by virtue of Sec. 41(12), (13) and (14) of Title 28, U. S. C. A., which confer upon the District Courts of the United States jurisdiction of actions to recover damages for deprivation of rights in furtherance of such conspiracies as are described in Sec. 47 of Title 8, U. S. C. A.

"The trial court was of the opinion that, since this Court had held in *Love v. United States,* 108 F. (2d) 43, 49, that the right of the appellant to be employed by the Works Progress Administration was not an absolute right conferred by the Constitution or laws of the United States and that the District Court was without jurisdiction to review the administrative action of which the appellant had complained in that case, the complaint in the instant action, under the rule announced in *Mitchell v. Greenough,* 9 Cir., 100 F. (2d) 184, certiorari denied 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056, did not state a claim for damages resulting from a conspiracy to deprive the appellant of any right or privilege dependent upon a law of the United States.

"The statutes which the appellant seeks to invoke were passed shortly after the Civil War to aid in

the enforcement of the Thirteenth Amendment prohibiting State action the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without due process or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. [Citing cases.] The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of the United States. [Citing cases.] The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (*United States v. Mosley,* 238 U. S. 383, 387, 388, 35 S. Ct. 904, 59 L. Ed. 1355), *did not have the effect of taking into federal control the protection of private rights against invasion by individuals.*[1] [Citing cases.] The protection of such rights and redress for such wrongs was left with the States. [Citing cases.]

"The appellant does not seek redress because the State of Minnesota is discriminating against him, or because its laws fail to afford him equal protection. We have already held that *he had no absolute* right under the laws of the United States to have or retain employment by the Works Progress Administration. The appellant seeks damages because certain persons, as individuals, have allegedly conspired to

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[1]All italics in this brief are ours, unless otherwise noted.

injure him and have injured him by individual and concerted action. The wrongs allegedly suffered by the appellant are assault and battery, false imprisonment, *and interference with his efforts to obtain and retain employment with the Works Progress Administration.* The protection of the rights allegedly infringed and redress for the alleged wrongs are, we think within the exclusive province of the State. [Citing cases.] We agree with the trial court that the appellant has failed to state a claim upon which relief could be granted under the statutes which he has invoked. His complaint was properly dismissed."

Similarly, in *Simpson v. Geary,* 204 Fed. 507, the plaintiffs contended that they were deprived of their right to work as brakemen and flagmen by reason of an Arizona law. In holding that no Federal jurisdiction could be invoked on the facts alleged in the complaint, the Court stated as follows:

"The right to contract for and retain employment in a given occupation or calling is not a right secured by the Constitution of the United States, nor by any Constitution. It is primarily a natural right, and it is only when a state law regulating such employment discriminates arbitrarily against the equal right of some class of citizens of the United States, or some class of persons within its jurisdiction, as, for example, on account of race or color, that the civil rights of such persons are invaded, and the protection of the federal Constitution can be invoked to protect the individual in his employment or calling."

Similarly, in *Mitchell v. Greenough* (C. C. A. 9), 100 F. (2d) 184, 187, this Court, in construing 8 U. S. C. A. 47, stated as follows:

> "The prohibition against 'denial of the equal protection of the law' was to prevent class legislation or action."

Appellants rely, on page 53 of their brief, on *Picking v. Pennsylvania Railroad Company,* 151 F. (2d) 240. It is difficult to observe what bearing the *Picking* case has upon the issues here presented. In that case, the Court specifically took judicial notice that certain of the defendants were acting as officials of the State of New York and of Pennsylvania. During the occurrence of acts alleged in the complaint, and having taken such notice, the court held that plaintiffs had alleged a cause of action within the meaning of 8 U. S. C. A., Sec. 43, providing that:

> "Every person who, *under color* of any statute, ordinance, regulation, custom or usage of any state . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law . . ."

In the present case, as previously noted, no allegation whatsoever exists in the complaint and no factual situation exists of which the Court could take judicial notice that the defendants or any of them are acting "under color of any statute, ordinance, regulation, custom or usage of any state."

At pages 55 and 56 of their brief, appellants cite *Bartling v. C. I. O.*, 40 Fed. Supp. 366, and rely upon language in that case such as the following taken from 40 Fed Supp. 366, 369:

> ". . . whenever a Federal question is involved, such as to wit: the right to work."

A close reading of the *Bartling* case will reveal that it is difficult to ascertain exactly what was the decision there made. Thus, at 40 Fed. Supp. 366, 368, the Court stated as follows:

> "Third, that where action is against the union and there is a federal right involved, it cannot be of such a frivolous nature as seemingly injected solely for the purpose of acquiring jurisdiction. (Levering, *supra.*) There must be a meritorious federal question otherwise the whole case falls.
>
> "But this court is not now convinced that all avenues of approach on this debatable issue have been exhausted and it must not be taken for granted that denial of defendants' motions determines in any way the merits of the action itself. The holding merely means that this court believes that plaintiffs have established a primary right to be heard in this forum."

If it be assumed that the Court intended to hold in the *Bartling* case that, irrespective of the lack of existence of any state action or any action under color of any state law, the bare right to work presents a federal

question, the decision is directly contrary to the holding in *Simpson v. Geary, supra,* 204 Fed. 507, and likewise is directly contrary to the holding in *Love v. Chandler, supra,* 124 F. (2d) 785, 786-787.

A further lengthy dissertation in accord with the *Chandler* decision will be found in *Love v. United States,* 108 F. (2d) 43, 45-6, the companion case of *Love v. Chandler, supra.*

Finally, at pages 56 and 57 of their opening brief, appellants rely upon *Douglas v. City of Jeanette,* 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324, 1327. It is unnecessary in order to point out the complete lack of applicability of the *Douglas* case to look further than to the quotation from that case set forth in appellants' brief to the effect that,

> "In substance, *the complaint alleges that respondents, proceeding under the challenged ordinance,* by arrest, detention and by criminal prosecutions of petitioners and other Jehovah's Witnesses, had subjected them to deprivation of their rights of freedom of speech, press and religion secured by the Constitution, and the complaint seeks equitable relief from such deprivation in the future."

In the present case, the complaint alleges no ordinance or State or Federal law whatsoever under which the defendants or any of them acted, and accordingly the provisions of 8 U. S. C. A. Sec. 43, upon which jurisdiction rested in the *Douglas* case, are clearly inapplicable.

II.

The Federal Declaratory Judgment Act Did Not Add to the Jurisdiction of the Federal Courts, but Merely Provided an Additional Remedy Within the Framework of the Previously Existing Federal Jurisdiction.

Authorities:

Aetna Casualty & Surety Co. v. Quarles, 92 F. (2d) 321, 323, 324;

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000);

Peoples Bank v. Eccles, 64 Fed. Supp. 811;

Mississippi Power & Light Co. v. City of Jackson, et al., 116 F. (2d) 924;

Oil Workers International Union, etc. v. Texoman Natural Gas Co., 146 F. (2d) 62;

Code of Civil Procedure of the State of California, Section 1060;

Columbia Pictures Corp. v. DeToth, 26 Cal. (2d) 753, 756;

Loew's Incorporated v. Basson, et al., 46 Fed. Supp. 66.

Appellants next contend on pages 31 to 38 of their opening brief that the District Court had jurisdiction by virtue of the provisions of the Federal Declaratory Judgment Act (Section 400, Title 98, U. S. C. A.). It is settled, however, that that Act added nothing to the jurisdiction of the Federal Courts and that diversity of citizenship or some other previously established basis for federal jurisdiction must exist even though the provisions of the Federal Declaratory Judgment Act are otherwise ap-

plicable. In the language of *Aetna Casualty & Surety Co. v. Quarles,* 92 F. (2d) 321, 323-4, "The federal Declaratory Judgment Act (Jud. Code Sec. 274d, 23 U. S. C. A. Sec. 400) is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the federal courts already have jurisdiction." Indeed, were Congress to attempt to expand the jurisdiction of the federal courts beyond the limits placed thereupon in the Federal Constitution, such attempted expansion would be unconstitutional and void. (See *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000.)

The authorities holding that the federal Declaratory Judgment Act did not confer additional jurisdiction on the federal courts are numerous and uniform:

Smith v. Blackwell, 34 Fed. Supp. 989, affirmed 115 F. (2d) 186;

Corcoran v. Royal Development Co., 35 Fed. Supp. 400; affirmed 121 F. (2d) 957; certiorari denied 62 S. Ct. 360, 314 U. S. 691, 86 L. Ed. 552;

Aetna Casualty & Surety Co. v. Quarles, 92 F. (2d) 321;

Samuel Goldwyn, Inc. v. United Artists Corporation, 113 F. (2d) 703;

McCarty v. Hollis, 120 F. (2d) 540;

Miles Laboratories v. Federal Trade Commission, 50 Fed. Supp. 434; affirmed 140 F. (2d) 683; certiorari denied 64 S. Ct. 1263; 322 U. S. 751, 88 L. Ed. 1582;

Home Ins. Co. of New York v. Trotter, 130 F. (2d) 800;

F. W. Maurer & Sons Co. v. Andrews, 30 Fed. Supp. 637;

Continental Casualty Co. v. National Household Distributors, 32 Fed. Supp. 849;

Koon v. Bottolfsen, 60 Fed. Supp. 316;

Duart Mfg. Co. v. Philad Co., 31 Fed. Supp. 548.

Innumerable cases uniformly so holding are to be found in the annotations to Title 28, Section 400, U. S. C. A., in the 1946 Pocket Supplement at pages 244 to 246.

Appellants rely on *Peoples Bank v. Eccles,* 64 Fed. Supp. 811, at pages 31 and 32 of their opening brief, and stress language in that case to the effect that the Federal Declaratory Judgment Act "should be liberally construed in accordance with the general canon of statutory construction applicable to remedial statutes." Patently, the Court in the *Eccles* case, in making the foregoing observation, had reference solely to the necessity for liberality in the interpretation of the remedial provisions of the Act in order that the Act may more expeditiously perform its intended purpose. That such was the intent of the Court is indicated beyond question by the Court's reliance in making the foregoing comment on *Mississippi Power & Light Co. v. City of Jackson, et al.,* 116 F. (2d) 924. At pages 32 and 33 of appellants' opening brief, quotations are made at length from the *Mississippi Power & Light Company* case. No necessity exists for going beyond the quotations thus given to reveal that that decision expressly recognized that, although the remedial provisions of the Declaratory Judgment Act are to be liberally construed, that Act did not add to the jurisdiction of the Federal Courts. In the language of that decision at 116 F. (2d) 924, 925, as quoted on pages 32 and 33 of

appellants' opening brief, "Plaintiff is here challenging the order as entered erroneously, *because its complaint showed the requisite diversity of citizenship* and jurisdictional amount . . ."; *"While the declaratory judgment act has not added to the jurisdiction of the federal courts,* it has added a greatly valuable procedure of a highly remedial nature." It need only be observed here again that in the present case the complaint not only fails to allege diversity of citizenship, or any other basis for federal jurisdiction, but affirmatively reveals that diversity of citizenship did not exist.

Similarly, in relying on *Oil Workers International Union, etc. v. Texoman Natural Gas Co.,* 146 F. (2d) 62, at page 34 of their brief, appellants failed to include the statement of the court in that decision (146 F. (2d) 62, at 65), that "Where a justiciable controversy exists *between citizens of different states* with regard to rights having a value in excess of $3,000.00, *as here,* the United States District Courts are vested with jurisdiction."

On pages 35-36, appellants quote section 1060 of the Code of Civil Procedure of the State of California, and cite *Columbia Pictures Corp. v. DeToth,* 26 Cal. (2d) 753, 756, a decision of the Supreme Court of California interpreting that code section. It is not apparent what bearing either the said code section or that decision have on the issue here presented, that of federal jurisdiction in the absence of diversity of citizenship.

Loew's Incorporated v. Basson, et al., 46 Fed. Supp. 66, cited at pages 37-38 of appellant's opening brief, has no bearing whatsoever on the contention of appellant's that the federal declaratory relief act eliminates the necessity for diversity of citizenship in all cases falling within the scope of its provisions.

III.

The Court Had No Jurisdiction Herein by Virtue of Any of the Provisions of the National Labor Relations Act.

Authorities:

U. S. C. A., Title 29, Section 150;

U. S. C. A., Title 29, Section 157;

U. S. C. A., Title 29, Section 160(a);

Blankenship v. Kurfman (C. C. A. 7), 96 F. (2d) 450;

United Electrical, etc., Workers v. I. B. of E. Workers, 115 F. (2d) 488, 489, 491, 492;

Lund v. Woodenware Workers Union (D. C. Minn), 19 F. Supp. 607;

U. S. C. A., Title 29, Sections 151-166;

Fur Workers Union, etc. v. Fur Workers Union, 105 F. (2d) 1, 12; affd. 308 U. S. 522, 84 L. Ed. 443;

Steele v. Louisville and Nashville, etc., 323 U. S. 192, 89 L. Ed. 173 (see Op. Br. pp. 49, 53);

Tunstall v. Brotherhood of Locomotive Firemen, etc., 323 U. S. 210, 89 L. Ed. 187;

Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 99 F. (2d) 309, 315;

Yoerg Brewing Co. et al. v. Brennan, et al., 59 Fed. Supp. 625, 632.

On pages 39 to 51 of their opening brief, appellants seek to establish that the Court had jurisdiction on the ground that this case arises under the constitution and laws of the United States in that it arises under the National Labor

Relations Act. (29 U. S. C. A. Sec. 150 *et seq.*) Plaintiffs rely upon section 7 of the N. L. R. A. (Section 157 of Title 29, U. S. C. A.) on page 39 of their brief, which section provides as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection."

The Complaint herein, however, does not allege any violation of the foregoing section. Even if it be assumed that the Complaint did allege such a violation, the United States District Court would yet be without jurisdiction, for the National Labor Relations Act provides that the National Labor Relations Board shall have exclusive power to enforce rights guaranteed by that Act to employees, subject only to review by the Circuit Court of Appeals. Thus Section 10(a) of the National Labor Relations Act (29 U. S. C. A., Sec. 160(a)) provides as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

It is settled, moreover, that rights and obligations of employers and employees under executed labor agreements do not arise under the National Labor Relations Act within the meaning of Article 3, Section 2, Subdivision 1 of the Federal Constitution, even though such agreements were

arrived at in conformity with the agreements of that Act. The Act does not provide for the interpretation or enforcement of agreements, but provides only for negotiations in good faith looking to agreements. Thus, *Blankenship v. Kurfman* (C. C. A. 7), 96 F. (2d) 450, involved an action by members of a union to enjoin another union from interfering with a contract between their union and their employer. With respect to the contention of the plaintiffs that federal jurisdiction was present on the ground that the case arose under the provisions of the National Labor Relations Act, the court held as follows:

> "The proposition of the plaintiffs that the effect of the National Labor Relations Act, especially Sections 157 and 159(a) of Title 29 U. S. C. A., is to create a federal right, the violation of which by the defendants entitles plaintiffs to injunctive relief, is untenable.
>
> . . .
>
> "The general purpose of the National Labor Relations Act is to provide methods of preventing or eliminating certain 'unfair practices' which have heretofore characterized the relation of employer and employee, and which have obstructed, or tended to obstruct, the free flow of commerce. The act creates certain rights and duties as between employer and employee and provides the procedure necessary to give effect thereto. *It seems clear that the only rights which are made enforceable by the Act are those which have been determined by the National Labor Relations Board to exist under the facts of each case; and when these rights have been determined, the method of enforcing them which is provided by the Act itself must be followed. And we find no provision in the Act which can be construed as intending to create rights for employees which can be enforced in federal courts in-*

dependently of action by the National Labor Relations Board. Consequently, we hold that the contract in the instant case between the plaintiffs and their employer did not, by force of the National Labor Relations Act, create a right in the plaintiffs which was secured to them 'By the Constitution or laws of the United States.' Consequently, the alleged unlawful interference by the defendants with the plaintiffs' contractual rights did not give a cause of action of which a federal court would have jurisdiction in the absence of diversity of citizenship."

Similarly, that a controversy between two competing labor unions based upon an alleged violation of one of the union's right of collective bargaining secured by Section 7 of the National Labor Relations Act, being Section 157, Title 29, U. S. C. A., does not "arise under the * * * laws of the United States" is clearly set forth in an opinion by that distinguished jurist, "Judge Learned Hand, Senior Circuit Judge, Circuit Court of Appeals, Second Circuit in *United Electrical, etc. Workers v. I. B. of E. Workers,* 115 F. (2d) page 488. From that opinion, we quote as follows from pages 489, 491 and 492 in Appendix "A" of this brief, reference to which is herewith made.

Again in *Lund v. Woodenware Workers Union* (D. C. Minn.), 19 Fed. Supp. 607, the Court had before it an action brought by the employer to restrain a minority group who were on strike and by acts of violence and intimidation were preventing the majority of the employees from working, resulting in the closing of plaintiff's factory. In accordance with the terms of the National Labor Relations Act, and particularly Section 157, Title 29, above quoted, plaintiff had entered into a contract with the duly elected bargaining agent of his employees. The primary

question before the Federal Court in that action was whether the Federal Court had jurisdiction. The Court said

> "plaintiff seeks to invoke the jurisdiction of this Court on the theory that, when the majority of the employees have elected their representatives for collective bargaining and a bargain is so made by them with the employer, the Wagner-Connery Labor Relations Act, 29 U. S. C. A., Sections 151-166, makes unlawful any course of conduct by the minority employees which tends to interfere with the agreement.
>
> . . .
>
> "There is no intimation in the Act, that, merely because an employer has entered into a contract with a majority union, Congress assumed to vest jurisdiction in the United States Courts to protect or safeguard the integrity of such contract. In fact, it seems reasonably clear that Section 159(a), 29 U. S. C. A., does not necessarily contemplate the making of a contract between the employer and employees, nor does it seek to compel an employer to make any contract with the designated representatives of the majority." (In support of the foregoing, the Court quotes from the opinion of Chief Justice Hughes in *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 57 S. Ct. 615.)

The relative jurisdictions of the Courts and the National Labor Relations Board under the provisions of the N. L. R. A. are expressed clearly and at length by Justice Stephens speaking for the United States Court of Appeals for the District of Columbia in *Fur Workers Union etc. v. Fur Workers Union,* 105 F. (2d) 1 at 12 (affirmed by the Supreme Court at 308 U. S. 522, 84 L. Ed. 443).

Again, Judge Sanborn, speaking for the Circuit Court of Appeals, Eighth Circuit, in *Donnelly Garment Co. v. International Ladies' Garment Workers' Union,* 99 F. (2d) 309 at 315, said:

> "It also seems clear to us that the only jurisdiction conferred by the National Labor Relations Act upon Federal Courts is that conferred upon Circuit Courts of Appeals with respect to enforcing, modifying and setting aside orders of the National Labor Relations Board."

To the same effect is the language used in *Yoerg Brewing Co., et al. v. Brennan, et al.,* 59 Fed. Supp. 625 at 632 (decided on March 6, 1945):

> "Summarizing our views, therefore, we are constrained to hold that the only jurisdiction conferred by the National Labor Relations Act upon the Federal Courts is that which is conferred upon the Circuit Courts of Appeals."

Cases relied upon by plaintiffs are *Steele v. Louisville and Nashville, etc., R. R.,* 323 U. S. 192, 89 L. Ed. 173 (hereinafter called the *Steele* case) (see Op. Br. pp. 49, 53), a companion case to which is *Tunstall v. Brotherhood of Locomotive Firemen, etc.,* 323 U. S. 210, 89 L. Ed. 187 (hereinafter called the *Tunstall* case). None of these cases, it is respectfully submitted, even remotely suggests that this Court has jurisdiction of the controversy disclosed by the Amended Complaint.

In the *Steele* case, the question presented was stated by the Chief Justice in the opening paragraph of the opinion as follows:

> "The question is whether the Railway Labor Act * * * imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, *the duty to represent all the employees in the craft without discrimination because of their race,* and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation."

And in the *Tunstall* case the Chief Justice summarizes the questions involved in the following language:

> "This is a companion case to No. 45, *Steele v. Louisville & N. R. Co.* decided this day * * * in which we answered in the affirmative a question also presented in this case. The question is whether the Railway Labor Act * * * imposes on a labor organization, acting as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft *without discrimination because of their race.* The further question in this case is whether the federal courts has jurisdiction to entertain a *non-diversity* suit in which petitioner, a railway employee subject to the Act, seeks remedies by injunction and awarded of damages for the failure of the union bargaining representative of his craft to perform the duty imposed on it by the Act, to represent petitioner and other members of his craft without *discrimination because of race.*"

It is apparent that the controversy in the instant case bears no resemblance to the controversy decided by the Supreme Court of the United States in the *Steele* and *Tunstall* cases. In the present case, no complaint is made by the plaintiffs that the Carpenters' Union, their legally constituted bargaining agent under the provisions of the National Labor Relations Act [Paragraph XI, page 5 of the Amended Complaint], is discriminating against them or any minority group because of race, color, or for any other reason. In fact, according to allegations in the Amended Complaint, the plaintiffs and those whom they purport to represent are well satisfied with the "contracts, decisions, findings, and awards in arbitration" negotiated for them and on their behalf by their bargaining representative, the Carpenters' Union; there is, moreover, no controversy between the plaintiffs and any of their fellow members concerning the effectiveness, desirability, or meaning of such "contracts, decisions, findings, and awards in arbitration." The controversy here is not, as it was in the *Steele* and *Tunstall* cases, inter-racial, but is a controversy between competing unions as to the meaning and application of certain alleged "contracts, decisions, etc." In the instant case, plaintiffs and those whom they purport to represent desire that certain "contracts, decisions, etc.," be interpreted as they and all affiliated with them desire to have them interpreted in order that the Carpenters may have jurisdiction over the erection of sets, whereas the International Alliance and the Producers interpret the said "contracts, decisions, findings, and

awards in arbitration" [Par. XII, Amended Complaint, Tr. p. 8] as granting jurisdiction to the Internation Alliance over the erection of sets, and it is the latter interpretation which has been put into effect and has been in operation for the past year.

Appellants at page 51 of their brief set forth the conditions stated on emergency working cards issued by the Division of Set Erection, I. A. T. S. E. Local 468, during the existence of the emergency created by the jurisdictional strike brought by the plaintiffs. On page 52 of their brief, appellants make the following comment:

> "It is respectfully submitted that the public interest, at this critical time in our country's history, requires a clear-cut, judicial determination that no industry is big enough, that no labor organization is strong enough, and that no combination is powerful enough, to nullify the laws of the United States.
>
> Andrew Jackson put an end to nullification."

Appellants having failed utterly to make allegations sufficient even to indicate any violation whatsoever of the provisions of the National Labor Relations Act by the appellees, or by any of them, it is indeed difficult to perceive even the slightest basis that would justify the comment that the appellees are seeking "to nullify the laws of the United States." It is respectfully submitted that if "Andrew Jackson" was requested to "put an end" to the "nullification" here presented his task would indeed be a nonentity.

IV.

The Court Had No Jurisdiction Under the Allegations in the Complaint by Virtue of the Provisions of 28 USCA, Section 41(8) Granting the Federal Courts Jurisdiction of All "Suits and Proceedings Arising Under Any Law Regulating Commerce."

Authorities:

American Federation of Labor, et al. v. J. Tom Watson, et al., 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873, 878;

Blankenship v. Kurfman (C. C. A. 7), 96 F. (2d) 450;

United Electrical, etc. Workers v. I. B. of E. Workers, 115 F. (2d) 488;

Lund v. Woodenware Workers Union (D. C. Minn.), 19 Fed. Supp. 607;

Fur Workers Union, etc. v. Fur Workers Union, 105 F. (2d) 1;

U. S. C. A., Title 29, Section 157;

U. S. C. A., Title 45, Section 152;

General Committee etc. v. Missouri-K.-T.-R. Co., 88 L. Ed. 76;

Delaware L. & W. R. Co. v. Slocum, 56 Fed. Supp. 634;

General Committee, etc. v. Southern Pacific Co., 320 U. S. 338, 88 L. Ed. 85.

On page 52 of their opening brief, appellants through a quotation from *American Federation of Labor, et al. v. J. Tom Watson, et al., supra,* 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873, at 878, make the contention that the District Court had jurisdiction under the provisions of 28 U. S. C. A., Section 41(8), granting jurisdiction to Federal District Courts of all "suits and proceedings arising under any law *regulating* commerce." The controversy presented by the amended complaint herein, however, does not arise out of any law *regulating* commerce. The fact that a controversy may *affect* interstate commerce does not give the Federal District Courts jurisdiction of such controversy under Section 41(8) of Title 28. Decisions squarely to that effect are found in Point III, *supra,* of this brief. (See *Blankenship v. Kurfman* (C. C. A. 7), *supra,* 96 F. (2d) 450; *United Electrical etc. Workers v. I. B. of E. Workers, supra,* 115 F. (2d) 488; *Lund v. Woodenware Workers Union, supra* (D. C. Minn.), 19 Fed Supp. 607; *Fur Workers Union, etc. v. Fur Workers Union, supra,* 105 F. (2d) 1.) Additional compelling authority to the same effect may be found in decisions that an action for declaratory judgment as to rights under a contract executed as a result of negotiations under the Railway Labor Act is not an action arising under any federal statute, including the commerce clause. Decisions under the Railway Labor Act are clearly in point because that act, like the National Labor Relations Act, requires that negotiations be had for the purpose of arriving at a contract but does not command the making of a

contract. Thus, Section 7 of the N. L. R. A. (U. S. C. A., Title 29, Sec. 157) may be compared as follows with Section 4, R. L. A. (U. S. C. A., Title 45, Sec. 152):

National Labor Relations Act, Section 7 (U. S. C. A., Title 29, Sec. 157):	*Railway Labor Act, Section Fourth (U. S. C. A., Title 45, Sec. 152):*
"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."	"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. . . ."

The decisions under the Railway Labor Act hereinafter discussed reveal without question that jurisdictional disputes between labor organizations, although involving contracts negotiated under the provisions of that Act, do not arise under the Commerce Clause. Thus, in *General Committee etc. v. Missouri-K.-T. R. Co.,* 320 U. S. 323, 88 L. Ed. 76, decided by the Supreme Court of the United States on November 22, 1943, it appeared that the National Mediation Board made a determination of a controversy between two unions of railroad employees as to which was the proper bargaining representative under the Railway Labor Act, and particularly with respect to the calling of engineers for emergency service. One of the labor unions, to-wit, Brotherhood of Locomotive Engineers, brought an action in the District Court of the United

States for the Northern District of Texas for declaratory relief, naming the employers and a competing union, the Locomotive Firemen and Enginemen, as parties thereto. The District Court dismissed the action and the Appellate Court, the Circuit Court of Appeals for the Fifth Circuit modified the judgment, and on writ of certiorari the Supreme Court of the United States reversed, stating *"we are of the view that the District Court was without power to resolve the controversy."*

As appears from the opinion and as specifically stated therein by the Court, a jurisdictional controversy existed between the two unions with respect to jurisdiction over the calling of emergency engineers. A similar jurisdictional controversy exists in the instant case between the Carpenters and The Alliance over the work of erecting sets in the Hollywood Studios. The provisions of the National Labor Relations Act and the Railway Labor Act with respect to the application of the principles of collective bargaining are to the same effect and almost identical in wording. We quote from the opinion of the Supreme Court of the United States in the *General Committee etc.* case at pages 83 to 84 of 88 L. Ed. in Appendix "B" of this brief, reference to which is herewith made.

In *Delaware L. & W. R. Co. v. Slocum,* 56 Fed. Supp. 634, *supra,* the District Court for the Western District of New York in 1944 had before it an action filed by the employer against competing labor unions in which declaratory relief was sought, the employer desiring a judgment construing certain separate contracts between the employer and two labor organizations. Each of the labor organizations claimed jurisdiction over and the right to represent "crew callers" and insisted that under their respective contracts

with the employer each had jurisdiction over such classification of work. In the instant case, both the Carpenters' Union and The Alliance claim jurisdiction over Set Erectors. In both the instant case and in the *Slocum* case, the only question presented was a jurisdictional controversy between competing labor unions, each claiming the right, under contract with the employer, to represent a certain classification of employment; in the instant case—set erectors, in the *Slocum* case—crew callers. In the *Slocum* case, as in the instant case, each claimed to be the duly elected sole bargaining agent for the class of employees involved. Motions to dismiss were interposed upon the ground that the Court lacked jurisdiction. We quote from the opinion as follows:

> "A suit does not arise under the laws of the United States unless it 'really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends.' [Citing cases.] It is patent from the complaint that this suit does not involve the 'validity, construction or effect' of any federal statute, *but rather seeks the determination of its rights or liabilities under certain contracts.* It has been urged that this is a suit for a violation of the commerce laws, 28 U. S. C. A., Sec. 41(8) and that this court has original jurisdiction. The nature of the suit is to be determined by the complaint [citing cases] and nothing therein reveals that the acts charged have any relation to the commerce laws. It is true that the plaintiff in the opera-

tion of its railroad was engaged in interstate commerce, *but the mere fact that interstate commerce may be affected is not sufficient to give jurisdiction in a* private suit unless the suit directly concerns an Act of Congress. [Citing cases.] THE ONLY ISSUE IS THE INTERPRETATION OF THE CONTRACTS."

In *General Committee, etc. v. Southern Pacific Co.,* 320 U. S. 338, 88 L. Ed. 85, which is a companion case to *General Committee, etc. v. Missouri-K.-T. R. Co., supra,* the Supreme Court of the United States at pages 87 and 88 of 88 L. Ed. has this to say concerning jurisdictional controversies between competing labor unions:

"We are concerned only with a problem of representation of employees before the carriers on certain types of grievances which, though affecting individuals, present a dispute like the one at issue in the *Missouri-Kansas-Texas R. Co.* case. *It involves, that is to say, a jurisdictional controversy between two unions.* It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. *It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the Missouri-Kansas-Texas R. Co. Case and in the Switchmen's Union of N. A. Case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute, from the others."*

It appears from the opinion in *American Federation of Labor v. J. Tom Watson, supra*, that the State of Florida adopted a Constitutional Amendment which was susceptible of an interpretation so as to outlaw closed-shop contracts in the State of Florida. Certain labor organizations and others filed an action in the District Court of the United States for the Southern District of Florida to "enjoin the enforcement of that provision" (the Section of the Constitutional Amendment which it was contended would make closed-shop contracts unlawful and provide criminal penalties for entering into them) "on the ground that it violated the First Amendment, Fourteenth Amendment, and the Contract Clause of Article I, Section 10 of the Federal Constitution *and was in conflict with the National Labor Relations Act.* As stated in the opinion "the theory of the bill is that the law in question outlaws any agreement which requires membership in a labor organization as a condition of improvement, all of which we refer to herein as the closed shop." We quote from the opinion on pages 718-719-720-721 and 722 of 90 L. Ed., Advance Sheet No. 11, in Appendix "C" of this brief, reference to which is herewith made.

From the foregoing quotations, it clearly appears that if the Florida Constitutional Amendment under attack had been construed as outlawing the closed shop it would have been in conflict with the National Labor Relations Act, which permits employees through the duly designated or certified bargaining representatives to negotiate such con-

tracts and *might,* therefore, have been held to be unconstitutional. Whether it would or would not have been so viewed was not determined by the Supreme Court as the matter was referred back to await a determination by the Florida Supreme Court of the meaning of the amendment. That the District Courts of the United States have jurisdiction to determine the constitutionality, on the ground that it runs counter to the Constitution of the United States or valid federal laws enacted pursuant thereto, of a State Legislative Act or an Amendment to a State's Constitution is unquestioned; it was not questioned by anybody in the *Watson* case. Here, in the instant case, we are not concerned with any act, legislative or otherwise, of the State of California, nor of the conduct of any of its officers claiming to act under color of state law. We, therefore, repeat that in our opinion there is nothing in the *Watson* case which even remotely suggests that jurisdiction of the present controversy is vested in this Court.

V.

The Provisions of the Sherman Anti-Trust Act Are Entirely Foreign to the Allegations in the Amended Complaint Herein.

Authorities:

Pennsylvania R. Co. v. Public Utilities Com., 298 U. S. 170, 56 S. Ct. 687, 80 L. Ed. 1130;

Barnsdall Refining Corp. v. Cushman-Wilson Oil Co. (C. C. A., Iowa), 97 F. (2d) 481;

Missouri Valley Shoe Corp. v. Stout (C. C. A., Mo.), 98 F. (2d) 514;

Federal Rules of Civil Procedure, Section 75(3);

Rules of the U. S. Circuit Court of Appeals for the Ninth Circuit, Rule 202(b)(3);

U. S. C. A., Title 15, Section 1;

Loew's Incorporated v. Basson, et al., 46 Fed. Supp. 66;

Allen Bradley Co., et al. v. Local Union No. 3 International Brotherhood of Electrical Workers, 325 U. S. 797, 65 Sup. Ct. 1533, 89 L. Ed. 1939;

U. S. v. Hutcheson, 312 U. S. 219, 85 L. Ed. 788;

U. S. C. A., Title 29, Sections 101-115;

U. S. C. A., Title 15, Section 12;

U. S. C. A., Title 29, Setcion 52;

U. S. C. A., Title 15, Section 15;

Gerli v. Silk Ass'n of America, et al., 36 F. (2d) 959;

Westmoreland Asbestos Co. v. Johns-Mansville Corp., et al., 30 Fed. Supp. 389; adhered to on reargument 32 Fed. Supp. 731; affd. Circuit Court of Appeals 113 F. (2d) 114;

Corey v. Boston Ice Co., 207 Fed. 465;

Loeb v. Eastman Kodak Co., 183 Fed. 704;

41 C. J., 186;

Roseland v. Phister Mfg. Co., et al., 125 F. (2d) 417.

Neither in the Amended Complaint, nor in the "Jurisdictional Statement" appearing on pages 1 to 5, inclusively of appellants' brief, nor in the paragraph headed "Jurisdiction" appearing on page 8 of said brief, nor in the Specifications of Error relied upon by appellants appearing on page 28 of their brief, nor in the Statement of Points Upon Which Appellants Intend to Rely on Appeal [see Tr. p. 136; see Federal Rules of Civil Procedure, Rule 75(d)), is there any suggestion made that the lower court had jurisdiction of this action on the ground that it was based, or that it even concerned in any manner the Federal Anti-Trust laws. In neither the oral argument, nor the written memorandum of Points and Authorities submitted to the lower court in argument on the Motion to Dismiss did appellants suggest that the Federal Anti-Trust Laws had anything to do with this litigation.

The first time in this action that such a suggestion was made is in its presentation before this court on pages 58 to 62 of appellants' opening brief.

It is indeed unfair to the lower court to wait until decision has been rendered by that court and then to urge on appeal an entirely new point not revealed in either the pleadings or the arguments below. In Paragraph VIII of the Amended Complaint, appellants alleged the various statutory provisions upon which reliance was

made for the jurisdiction of the District Court. Nowhere in that paragraph or in any other paragraph in the Amended Complaint was any mention made of any provision of the Sherman Anti-Trust Laws.

That the lower court relied upon the basis for jurisdiction set forth by appellants is revealed in the opinion of that court in which the court stated as follows: "Since this is a court of limited jurisdiction, every case brought here must fall within the terms of a provision of some statute of the United States."

Plaintiffs allege (Paragraph VIII):

> "Jurisdiction of this Court is vested by virtue of Section 400, Title 28, United States Code Annotated; Section 41(1), 41(8), 41 (12), and 41(14), Title 28, United States Code Annotated; Section 729, Title 28, United States Code Annotated; Sections 43 and 47(3), Title 8, United States Code Annotated; Section 157, Title 29, United States Code Annotated; and the Constitution of the United States, Amendments V and XIV."

If the case does not fall within the terms of one or more of these statutes or amendments to the Constitution, the court must dismiss the action for want of jurisdiction.

It is settled that appellate courts frown, except in unusual cases, upon points raised for the first time on appeal, especially when the raising of such points require the adoption of an entirely new theory from that which was presented to the court below. (*Pennsylvania R. Co. v. Public Utilities Com.*, 298 U. S. 170, 56 S. Ct. 687, 80 L. Ed. 1130; *Barnsdall Refining Corp. v. Cushman-Wilson Oil Co.* (C. C. A., Iowa), 97 F. (2d) 481; *Missouri Valley Shoe Corp. v. Stout* (C. C. A., Mo.), 98 F. (2d)

514.) Moreover, in failing to set forth in their Statement of Points on Appeal [See Tr. p. 136], their new theory that the amended complaint herein falls within the provisions of the federal anti-trust laws, appellants have violated section 75(3) of the Federal Rules of Civil Procedure, which section provides as follows:

> "(d) STATEMENT OF POINTS. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal."

Similarly, in failing to point out what provisions of the complaint set forth the allegations requisite to bringing the pleading within the scope of the federal anti-trust laws, appellants have violated Rule 202(b)(3) of the U. S. Circuit Court of Appeals—Ninth Circuit—appellate rules. Rule 202(b)(3) requires that the brief on appeal shall contain

> "in order here stated— . . . (b) A statement of the pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this court has jurisdiction upon appeal to review the judgment, decree or order in question. The statement *shall refer distinctly* . . . (3) To the pleadings necessary to show the existence of the jurisdictions, *referring to the pages of the record in which they appear.*"

In any event, again culling the factual allegations in the Amended Complaint from the conclusions of law therein set forth, no allegations whatsoever appear that would justify the conclusion that a cause of action had been

stated under the Sherman Anti-Trust Act. Section 1 of that Act (15 U. S. C. A., Sec. 1) provides as follows:

> "Every contract, combination in the form of trusts or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal."

There is no allegation in the Amended Complaint whatsoever that the defendants have done acts, "in restraint of trade or commerce among the several states." The only reference to interstate commerce that appears in the Amended Complaint is found in Subparagraph 4 of Paragraph XXXIV [Tr. p. 21] in which the plaintiffs allege that the declaratory relief sought by them was the only remedy available to them "To maintain the continued and uninterrupted flow of interstate commerce in the motion picture industry under the good faith observance of said contract and arbitration determination." This statement at best is a mere conclusion. It does not constitute an allegation that any conduct of the respondents resulted in restraint of trade or commerce among the several states. The statement certainly does not even remotely suggest a claim on the part of appellants that they were seeking declaratory relief under the sections of the Federal statutes relating to combinations and monopolies in restraint of trade. Certainly the quoted statement does not constitute an allegation that the "Flow of interstate commerce in the motion picture industry has been interrupted or not continued," because others have been doing the carpentry work in the studios that appellants desired to do.

Loew's Incorporated v. Basson, et al., 46 Fed. Supp. 66 relied upon at page 58 of appellants' brief and set forth

at length on pages 8 to 16 of the appendix to appellants' opening brief was a decision brought specifically under the provisions of the Sherman Anti-Trust Act, and an allegation to that effect was specifically set forth in the Complaint therein. The allegations made in the complaint concerned in the *Loew's* case upon which the court relied in holding that the Norris-LaGuardia Act, 29 U. S. C. A., Sections 101-115 did not remove the conduct of the defendants, as set forth in the complaint in that case, from the Sherman Anti-Trust law, are totally absent from the Amended Complaint herein concerned. In the *Loew's* case the complaint alleged that the defendant Labor Union, Local 306 made demand upon the plaintiff, Moving Picture Producers and Distributors that the plaintiff not only hire members of the defendant local in its own theatres and distributorship system, but that the plaintiff agree to distribute film only to those independent exhibitors that engaged projectionists solely from the membership of the defendant local. The complaint also alleged that the plaintiff had distributing contracts with a number of independent distributors, which said contracts would be violated by the plaintiff if the plaintiff complied with that demand of the defendant local. It was solely upon those allegations in the complaint, that is, the allegations that the defendant local was demanding of the plaintiff, and was attempting to enforce that demand by strikes and other weapons of labor, that the plaintiff agree to distribute to those independent exhibitors only who hire projectionists from the defendant local, that the court relied in the *Basson* case to hold that the Norris-LaGuardia Act did not remove the allegations of the complaint from the scope of the Sherman Anti-Trust Act.

That such was the basis of its decision is made clear by the court in 46 Fed. Supp. 66, 71-72,

> "Examining the situation in the case at bar, it appears from the complaint that the parties originally entered into negotiations for a new contract with respect to the projection men employed by plaintiff at its home office and its New York exchange. These men, who were members of defendant Local 306, had been employed under a contract which had expired on August 30, 1940 and they had continued in plaintiff's employ under the terms and conditions of said contract. Up to this point, there is clearly such a labor dispute as would necessitate the dismissal of this complaint.
>
> "However, the Union (Local 306) then saw fit to inject a demand in their proposed contract which had nothing whatever to do with the terms and conditions of employment of these men. They then made a new and further demand upon plaintiff that it must refuse to license any exhibitor who did not employ members of Local 306; that it must not send any prints to those exhibitors, and that it was not to expect any member of Local 306 to work on any prints which would subsequently be exhibited by an exhibitor who did not employ Local 306 projection men exclusively. This demand had nothing whatever to do with the wages, conditions, terms and other lawful objectives of labor which were then under discussion between plaintiff and defendant Local 306, with respect to the members of said Local who were employed by plaintiff at its home office and its New York exchange.
>
> "The Norris-LaGuardia Act was intended to protect the normal activities of labor in the formation of unions and in acting together to further their interests as members of a union, and from being re-

garded as constituting a conspiracy, even though their union activities might, to some extent, affect interstate commerce. *Allen Bradley Co. v. Local Union No. 3, et al.,* D. C. 41 Fed. Supp. 727, 750. The statute, however broad, does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. *Columbia River Packers Ass'n, Inc., v. Hinton,* 315 U. S. 143, 146, 147, 62 S. Ct. 520, 86 L. Ed.

"In the case at bar, the employer-employee relationship has no bearing. Local 306 is attempting to compel plaintiff to force the independent exhibitors whom plaintiff licenses to employ only members of Local 306 in its projection rooms. It is in the nature of a reverse secondary boycott, where the union, instead of attempting to coerce the retailer who carries non-union goods, here attempts to coerce the distributor of union goods to stop furnishing said materials to non-union customers. I do not believe that this is a labor dispute, nor do I believe that such action constitutes a lawful trade union objective."

There is in the Amended Complaint herein concerned no element even remotely similar to that concerned in the *Basson* case on the basis of which the court there held that the Sherman Anti-Trust Act was applicable. As previously noted, the Amended Complaint herein is divided into two causes of action. Disregarding legal conclusions, the allegations in the first cause of action are solely to the effect that there existed at the time of the filing of the Amended Complaint a jurisdictional dispute between Local 946 of the United Brotherhood of Carpenters and Joiners of America and the defendant IATSE arising out of a series of contracts and awards involving the question as to which labor organization had jurisdiction

to construct the sets used on stages in the production of moving pictures. The second cause of action incorporates all of the allegations in the first cause of action and adds in addition sole new allegations to the effect that in its said jurisdictional dispute the defendant, Motion Picture Companies and Producers Association conspired with the defendant labor organizations "to deprive plaintiffs of the right and privilege to work at their chosen vocation, to-wit, studio carpenters."

On pages 60 to 62 of their opening brief, appellants insert quotations from *Allen Bradley Co. et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al.*, 325 U. S. 797, 65 Sup. Ct. 1533, 89 L. Ed. 1939. The very first sentence that is quoted from the *Allen Bradley* case reveals without question that that case has no bearing whatsoever upon the issues here presented:

> "The question presented is whether it is a violation of the Sherman Anti-Trust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufactures of goods to restrain competition in, and to monopolize the marketing of, such goods."

In the *Bradley* case, the factual situation upon which the court relied in holding that the Sherman Anti-Trust Act (26 Stat. 209, Chap. 647, 15 U. S. C. A., Sec. 1 *et seq.;* 4 F. C. A., Title 15, Sec. 1, *et seq.*) was there applicable was a combination between contractors, manufacturers, and defendant Local Union No. 3 in the City of New York that was designed for the specific purpose of excluding from the City of New York all electrical

equipment not manufactured in the City of New York in order that the contractors would be required to purchase all electrical equipment from manufacturers in the City of New York, as a result of which more jobs and better wages were obtained by defendant Local Union No. 3. Through a series of labor movements, the defendant Local had obtained close shop contracts with most of the contractors and manufacturers in the electrical supply industry, and thus the defendant Local was in a position to dominate completely, in the language of the court, "Not merely * * * terms and conditions of employment * * * but also price and market control." (*Allen Bradley, supra,* 325 Fed. 797, 799-800, 89 L. Ed. 1939-1943.) In the further language of the court:

> "We have been pointed to no language in any act of Congress or in its reports or debates, nor have we found any, which indicates that it was ever suggested, considered, or legislatively determined that labor unions should be granted an immunity such as is sought in the present case. It has been argued that this immunity can be inferred from a union's right to make bargaining agreements with its employer. Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to agree to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in

> New York City, to bar all other business men from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. Apex Hosiery Co. v. Leader, *supra* (310 U. S. 503, 84 L. Ed. 1329, 60 S. Ct. 982, 128 A. L. R. 1044). But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Act."

No further comment is needed to point out that the factual situation in the *Allen Bradley* case was completely foreign to that presented by the allegations herein concerned. On the contrary it was settled in *U. S. v. Hutcheson,* 312 U. S. 219, 85 L. Ed. 788, that the acts of the members of a labor union whether or not operating in restraint of interstate commerce, are taken out of the provisions of the Federal Anti-Trust Act by the provisions of Sec. 20 of the Clayton Act (38 Stat. at L. 730, Chap. 323; 29 U. S. C. A., Sec. 52). Since that decision concerned a jurisdictional dispute involving a strike because of an employer's refusal to accede to the union's demand that certain work be given to its members rather than to members of another craft union, the facts of the *Hutcheson* case are strikingly similar to those presented by the

Amended Complaint herein. (See *U. S. v. Hutcheson, supra,* 312 U. S. 219, 227, 85 L. Ed. 788-791.)

After setting forth the provisions of the Clayton Act of 1914 (38 Stat. at L. 730, Chap. 323, 15 U. S. C. A., Sec. 12), and of the Norris-La Guardia Act, *supra* (47 Stat. at L. 70, 29 U. S. C. A., Sec. 101-115) and discussing their history, the court pointed specifically to Section 20 of the Clayton Act (29 U. S. C. A., Sec. 52) and commented as follows:

> "There is nothing remotely within the terms of Sec. 20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer. Such strife between competing unions has been an obdurate conflict in the evolution of so-called craft unionism and has undoubtedly been one of the potent forces in the modern development of industrial unions. These conflicts have intensified industrial tension but there is not the slightest warrant for saying the Congress has made Sec. 20 inapplicable to trade union conduct resulting from them.
>
> "In so far as the Clayton Act is concerned, we must therefore dispose of this case as though we had before us precisely the same conduct on the part of the defendants in pressing claims agianst Anheuser-Busch for increased wages, or shorter hours, or other elements of what are called working conditions. The fact that what was done was done in a competition for jobs against the Machinists rather than against, let us say, a company union is a differentiation which

> Congress has not put into the federal legislation and which therefore we cannot write into it." (*U. S. v. Hutcheson, supra,* 312 U. S. 319, 322-323, 85 Lawyer's Ed. 788-793.)

In the present case, all charges made in the Amended Complaint against the defendant "IATSE" are charges of acts done in competition for jobs against the plaintiff carpenters and under the express holding in the *Hutcheson* case the provisions of the Sherman Anti-Trust Act are inapplicable.

Moreover, in the absence of diversity of citizenship or other basis for federal jurisdiction, actions under the Sherman Anti-trust Law are limited to those brought by a person "injured in his business or property." Thus, section 15, of Title 15, U. S. C. A. provides that

> "Any person who shall be injured in his buisness or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

It is clear, that under the decisions interpreting the phrase "injured in his business or property," the complaint reveals that none of the plaintiffs fall within the meaning of that phrase.

It has been uniformly held that a person who is an employee that loses his employment by reason of a combination forbidden in the anti-trust laws, or is an officer of a corporation and loses such office and the salary appurtenant thereto, or is a creditor of an individual or a corporation

put out of business, or is a stockholder whose stock becomes worthless, all by reason of combinations forbidden by such law, does not come within the meaning of the clause "injured in his business or property." In the complaint herein it is not even alleged or claimed that the employment of the plaintiffs or of any of them was for a stated period or that any of them had contracts that required the employers to continue their employment. Independently, however, of that basic defect, in the complaint, it is clear that none of the plaintiffs has been "injured in his business or property."

One of the most frequently cited decisions on this question is *Gerli v. Silk Ass'n of America, et al.,* 36 F. (2d) 959, in which the Court opens its opinion by stating: "Right to recover in this suit must be predicated on injuries to the plaintiff's 'business or property.'" It appears further from the Court's opinion

> "that in all of the actions and proceedings hereinabove referred to, the plaintiff, Paul Gerli, acted on behalf of said Gerseta Corporation, and by the bill of particulars, wherein it is stated that the plaintiff was engaged in dealing in silks and silk products as an officer, stockholder, and managing agent of the Gerseta Corporation, and as employee of said corporation engaged as such in the trade and commerce of the corporation."

A combination in restrain of trade against the Gerseta Corporation was alleged, and it was further set forth

> "that plaintiff's participation in foreign trade and commerce had been in his individual capacity, and further that when engaged in his individual capacity, he traded under his own name in the City of New York. * * * Accordingly they must be interpreted as meaning that in certain transactions conducted by the

plaintiff *in behalf of* (emphasis by Court) the Gerseta Corporation he did business in his own name."

Further, in setting forth the factual situation, the Court said:

"Aside from injuries to the business of the Gerseta Corporation and to the business of a company in which his family was interested, plaintiff's only claims of damage are losses incurred by reason of the inability of the Gerseta Corporation to pay indebtedness owing to him, impairment of the value of his stock in the Gerseta Corporation, losses of future salaries and commissions to be received by him from the Gerseta Corporation, injury to his general credit and reputation, and damage to his business name and reputation."

In disposing of the action adversely to the plaintiffs, the Court, on pages 960 and 961, said:

"In terms, the statute (15 U. S. C. A., Sec. 15), gives a right of action to one who has been 'injured in his business or property.' Keogh v. Chicago & N. W. R. Co., 260 U. S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 163. In order to state a cause of action, plaintiff must therefore show by appropriate allegation that he has been injured in his business or property. It is not enough to allege something forbidden by the Anti-Trust Laws (15 U. S. C. A., Secs. 1-7, 15) and to claim general damage resulting therefrom. (American Sea Green Slate Co. v. O'Halloran (C. C. A.) 220 P. 77, 79), but the complaint asserting a statutory cause of action must affirmatively show the nature and character of the injury suffered, and that it was an injury to the plaintiff's business or property within the meaning of the statute. Noyes v. Parsons (C. C. A.)

245 P. 689; Jack v. Armour & Co. (C. C. A.) 291 P. 741; Alexander Milburn Co. v. Union Carbide & Carbon Corp. (C. C. A. 4), 15 P. (2d) 678. . . . *Nor is the loss of a corporate office and the salary incident thereto injury to business or property within the meaning of the statute.* Corey v. Boston Ice Co. (D. C.) 207 P. 465. Injuries to plaintiff's general credit and reputation are not injuries to his business (for he had none independently of the corporate business) or to his property. Reference is made to United Copper Securities Co. v. Amalgamated Copper Co. (C. C. A.) 232 P. 574, but there the right to recover treble damages was predicated upon injury to the business of organizing, promoting, and financing companies in which plaintiff's assigners were engaged as individuals. The plaintiff could not be injured in his business, because he had none of his own or any plans to engage in any business other than the business of the corporation for which he worked. Such decisions as Thomsen v. Union Castle Mail S. S. Co. (C. C. A.) 166 P. 251; Penn. Sugar R. Co. v. American Sugar R. Co. (C. C. A.) 166 P. 254, and Meeker v. Lehigh Valley R. Co. (C. C. A.) 183 P. 548, are therefore not in point."

We direct the Court's attention to the case of *Westmoreland Asbestos Co. v. Johns-Manville Corp., et al.,* 30 Fed. Supp. 389, adhered to on re-argument in 32 Fed. Supp. 731, and affirmed by the Circuit Court of Appeals for the Second Circuit "on opinion below" in 113 F. (2d) 114, in which the court observed that *"neither loss of corporate office and salary incident thereto, nor injuries to a corporate officers general creditor are injuries to his business or property within the meaning and intent of the Anti-Trust laws."*

Another decision on this subject frequently noted is *Corey v. Boston Ice Co.,* 207 Fed. 465, in which the plaintiffs alleged that as a result of an unlawful combination in violation of the anti-trust act the defendants acquired control of a corporation of which plaintiffs were salaried officers, and following such control plaintiffs were removed from office and deprived of their salaries. The Court in denying relief, on page 466, stated as follows:

> "However long they held their respective offices, or however frequently they may have been re-elected, there is nothing to show that they had any right to expect that they would be chosen again at this or any given election, nor to show any right of property in the offices mentioned or the salaries attaching thereto, or any such interest in them after the dates of the meetings in 1908 as entitled them to say that failure to elect them to those offices was an injury to their business within the meaning of section 7, whether or not the election of other persons in their places can be said to have been acts unlawful because done, as the plaintiffs say, in pursuance and furtherance of a combination, conspiracy, or in an attempt to monopolize, obnoxious to the act. *That they lost the salaries they have been receiving and have not been able to get other employment or other remunerative employment since cannot therefore give them any rights against the defendant under section 7.*"

Accord:

Loeb v. Eastman Kodak Co., 183 Fed. 704.

The rule is stated in 41 Corpus Juris, page 186, as follows:

> "If the injury sustained is indirect, remote, and consequential, there can be no recovery."

The most recent decision on the subject is *Roseland v. Phister Mfg. Co., et al.,* a decision of the Circuit Court of Appeals for the Seventh Circuit reported in 125 F. (2d) 417, from which at page 419, we take the following observation:

> "Ordinarily persons who may claim injury to their business under the Act do not include a stockholder making claim for injury or damage to the business of his corporation, *Corey v. Independent Ice Co.,* D. C. 207 F. 459; *Gerli v. Silk Ass'n of America, et al.,* 36 F. 2d 959, a creditor suing to recover damages to his debtor's business, *Noyes v. Parsons, et al.,* 9 Cir., 245 F. 689, or an officer or director suing to recover for injury to the business of the corporation."

A discussion of this question may be found in 139 A. L. R. at page 1017.

Accordingly, even if it be assumed that the complaint herein alleged, which it does not, that the defendants engaged in a combination "in restraint of commerce or trade" in the movie industry, if as a result of any such combination having such effect, plaintiffs lost their jobs, theirs was an incidental injury, if any, and certainly not one that resulted from any such hypothetical curtailment of commerce or trade in that industry.

VI.

The Taft-Hartley Bill, Effective Approximately Five Months After the Dismissal Below, Has No Bearing Whatsoever on This Action.

Authorities:

Vandenbark v. Owens-Illinois Glass Company, 110 F. (2d) 310 at 313-314;

Neild v. District of Columbia, 110 F. (2d) 246, 254;

Wright v. Southern Railroad Company, 80 Fed. 260;

Newgass v. Atlantic & D. Ry. Co., 56 Fed. 676;

Taft-Hartley Bill, Section 301(a);

H. R. 3020, Cal. No. 105, April 18, 1947;

Oscar Schatte, et al. v. International Alliance, etc., et al. (Dist. Ct. So. Dist., Central Div., Calif.), No. 7304-PH;

I. M. R. A., 1947, Section 301, Subsection (a).

Finally, appellants put forth the contention on pages 63 to 67 of their opening brief that jurisdiction in the Court below was vested by virtue of the provisions of the Taft-Hartley Bill. The original complaint herein, however, was filed on December 7, 1946. The amended complaint was not filed until January 3, 1947. The Taft-Hartley Bill, however, did not become effective until June 23, 1947, although judgment of dismissal below had been rendered on February 25, 1947. Accordingly, the Taft-Hartley Bill could not possibly constitute a ground for reversal unless it were given a retroactive effect. It is settled, however, that unless a newly enacted statute is specifically given retroactive effect by the Legislature its effect will solely be pros-

pective. In the language of *Vandenbark v. Owens-Illinois Glass Company,* 110 F. (2d) 310 at 313-314:

> ". . . a law is presumed, in the absence of clear expression to the contrary, to operate prospectively. *United States v. Heth,* 3 Cranch 399, 413, 2 L. Ed. 479; *Schwab v. Doyle,* 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454; *United States v. Magnolia Petroleum Co.,* 276 U. S. 160, 172, 48 S. Ct. 236, 72 L. Ed. 509, or its necessary converse, that for a statute to be construed as operating retrospectively, its retrospective character must be derived from 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature', *Union Pacific Ry. Co. v. Laramie Stockyards,* 231 U. S. 190, 34 S. Ct. 101, 102, 58 L. Ed. 179; or as said in *United States v. Heth, supra,* the declaration of retroactivity must be 'clear, strong and imperative.' "

In the further language of *Neild v. District of Columbia,* 110 F. (2d) 246, 254:

> "The rule is well settled that unless the contrary plainly appears a statute operates prospectively only (*Cox v. Hart,* 260 U. S. 427, 434, 43 S. Ct. 154, 67 L. Ed. 332; *Big Diamond Mills Co. v. United States,* 8 Cir., 51 F. 2d 721, 726). See generally, Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 778 *et seq.*); in other words, 'that a statute ought not to be construed to operate retrospectively in the absence of clear, strong, and imperative language commanding it (*Home Indemnity Co. v. Missouri,* 8 Cir., 78 F. 2d 391, 394. See also, *United States v. Heth,* 3 Cranch, U. S., 399, 413, 2 L. Ed. 479; *Union Pacific R. Co. v. Laramie Stock Yards Co.,* 231 U. S. 190, 34 S. Ct. 101, 58 L. Ed. 179; *Jones v. Fidelity & Columbia*

Trust Co., 6 Cir., 73 F. 2d 446); and if a double sense is possible that which rejects retroactive operation must be selected. (*Shwab v. Doyle,* 258 U. S. 529, 535, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454.)"

See, also:

Wright v. Southern Railroad Company, 80 Fed. 260;

Newgass v. Atlantic & D. Ry. Co., 56 Fed. 676.

There can be no question whatsoever that Section 303(a) of the Taft-Hartley Bill, relied upon at pages 65 to 67 of appellants' opening brief, creates new liabilities that did not previously exist, and that, accordingly, under uniform authority, that Section cannot be given retroactive effect.

On page 64 of appellants' opening brief, appellants cite Section 301(a) of the Taft-Hartley Bill which provides as follows:

"Sec. 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The complaint herein, however, does not in any event fall within the scope of Section 301(a) for the reason that that Section authorizes only suits between an employer and a labor organization representing employees or between

any such labor organizations. There is nothing whatsoever in Section 301(a) that authorizes actions to be brought by individual employees as contrasted to labor organizations. Thus, it will be observed that the jurisdiction vested in District Court of the United States in that subsection is narrowly canalized; the subject matter of such actions is limited to "suits for violation of contracts," and those who may bring such actions or be made defendants therein must fall within confined categories, to-wit, employers or labor organizations representing employees in an industry affecting commerce. Assuming proper subject matter and proper parties, the District Courts of the United States have jurisdiction without respect to the amount in controversy or without regard to the citizenship of the parties. In the present suit, action was instituted solely by individual members of a labor organization and there is presented here neither a suit between an employer and a labor organization nor a suit between labor organizations.

On page 63 of their opening brief appellants quote discussions in the House debate on H. R. 3020, published in the Congressional Record April 17, 1947, page 3734, and rely upon a statement of Mr. Barden that "interested individual employees under the Declaratory Judgment Act" could bring proceedings under the provisions of Section 302 of the House Bill H. R. 3020. An analysis of the statements of Mr. Barden and Mr. Case of South Dakota, as quoted on page 64 of appellants' opening brief, however, when review in the light of the statement of Mr. Case of South Dakota, on page 64, that "It is involved

in the case of the Motion Picture Players of California . . ." would seem to indicate that the questions thus asked were perhaps not entirely posed without a very specific design in mind which design was entirely foreign to any true manifestation of congressional intent. It is to be noted that at the date of the making of the foregoing comment, this very action was pending.

Moreover, Section 302(a) of the House version of the Taft-Hartley Bill, which was the version under discussion in the foregoing hearing, was a very different draft from the provisions of Section 301(a) of the Taft-Hartley Bill that finally became law. Section 302(a) thus under discussion provided as follows:

> "Sec. 302. (a) Any action for or proceeding involving a violation of an agreement between an employer and a labor organization *or other representative of employees* may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause." (See H. R. 3020, Calendar No. 105, April 18, 1947.)

In addition to other important changes, there was deleted from the provisions of Section 302(a) of the House bill, the phrase, "or other representative of employees," and such deletion clearly indicates the intent of Congress that law suits authorized under Section 301(a) of the Taft-Hartley Bill to be brought without regard to diversity of citizenship, were intended to be limited to suits between

an employer and a labor organization or between labor organizations. No clearer indication of intent than that indicated by the deletion of that phrase that suits by individual employees such as that here involved were not to be within the scope of the provisions of the final enactment could possibly be presented.

Moreover, the committee reports and congressional debates clearly indicate that Congress intended to limit jurisdiction under Section 301(a) to actions brought by labor organizations or employers. The following are examples of such reports and debates:

> *Report on Conference Bill by Managers on the Part of the House:*
>
> "The report stated that the Conference Agreement followed the House Bill in providing 'that any action for or proceeding involving a violation of a contract between an employer and a labor organization might be brought *by either party* in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such contract affected commerce, or the court otherwise had jurisdiction.'
>
> *"Report of the Senate Committee on Labor and Public Welfare:*
>
> " 'Title III.
>
> "Suits by and Against Labor Organizations
>
> "Section 301 is the only section contained in this title. [Others added on Senate floor and in confer-

ence.] It relates to *suits by* and against *labor organizations* for breach of collective bargaining agreements.'

Records of the Debate in the House of Representatives.

"On April 25, 1947, Mr. Murray, opposing the Bill, said:

" 'This section permits *suits by* and against *a labor organization* representing employees in such industries, in its common name, with money judgments enforceable only against the organization and its assets.' (p. 4153.)

"On April 30, 1947, Mr. Smith said, supporting the Bill:

" 'I now come to Title III, which is very brief, and merely provides for *suits by* and against *labor organizations,* and requires that labor organizations, as well as employers, shall be responsible for carrying out contracts legally entered into as the result of collective bargaining. That is all Title III does." (p. 4410.)"

Moreover, that it was the intent of Congress to limit jurisdiction under Section 301(a) to actions brought by labor organizations or employers is indicated with clarity by the provisions of Section 301(b) of the Labor-Management Relations Act which provides as follows:

"(b) Any *labor organization* which represents employees in an industry affecting commerce as defined in this Act and *any employer* whose activities affect commerce as defined in this Act shall be bound by

> the acts of its agents. Any *such labor organization* may sue or *be sued* as an entity and *in behalf of the employees whom it represents in the courts of the United States.* Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

Thus Section 301(b), immediately following Section 301 (a), provides that "Any *labor organization* which represents employees in an industry affecting commerce as defined in this Act . . . may . . . *be sued* . . . *in behalf of the employees whom it represents in the courts of the United States.*" Thus, section 301(b) provides for suits by dissident groups within a union against the union itself. There is no provision in Section 301(b) or anywhere else in the Labor-Management Relations Act, however, that provides that the "employees" of an outside and hostile labor organization may sue such labor organization. Clearly, in thus providing for suits by dissident groups within a union against a union itself and yet remaining totally silent with respect to the rights of groups within a union to sue an outside union, the congressional intent is indicated that such latter suits are not to be authorized by the provisions of the Act. It is respectfully submitted that no clearer example of the applicability of the well settled doctrine of *expressio unius est exclusio alterius* could be found than is thus presented.

On pages 66 and 67 of appellants' opening brief, quotations are taken from *Federal Deposit Insurance Corporation v. George-Howard,* 153 F. (2d) 591, at page 593. It is respectfully submitted that that decision has no bearing whatsoever upon the Labor Management Relations Act of 1947 or upon any of the other issues here presented.

It is further submitted that this court has the right to take judicial notice of actions pending in the various district courts of the United States comprising the 9th Circuit, that involve the identical litigation that is here presented, and we therefore ask this court to take judicial notice of the action of *Oscar Schatte, et al. v. International Alliance etc., et al.,* being No. 7304-PH in the office of the Clerk of the District Court of the United States in and for the Southern District of California, Central Division, which said action was filed on July 2, 1947. In that action, certain of the plaintiffs in this action are plaintiffs there and the defendants herein are made defendants therein. The plaintiffs in that action have specifically pleaded and have specifically attempted to set forth causes of action under the Federal Anti-Trust Laws and under the Labor Management Relations Act based on the same factual situation here concerned. We respectfully submit further that no attempt was made in the amended complaint herein to state causes of action under either of the said statutory enactments and that no such causes of action were stated.

Conclusion.

The intentional or unintentional efforts of appellants to obscure the issue, made through the use to great excess in their complaint of legal conclusions and through the use of vague terms totally unassociated with any provisions of Federal statutory or constitutional law in their opening brief, do not eliminate the fact that the complaint indicates clearly that this litigation involves merely a jurisdictional dispute between two labor unions over the jurisdiction of the task of erecting sets in the Hollywood studios, which dispute centers around the interpretation of certain contracts and awards.

Since the complaint herein affirmatively reveals that no diversity of citizenship exists between the plaintiffs and the defendants or any of them, it is respectfully submitted that the decision of the lower court dismissing the complaint was unquestionably sound.

Respectfully submitted,

Bodkin, Breslin & Luddy,
Henry G. Bodkin,
George M. Breslin,
Michael G. Luddy,
Peter E. Giannini,
Attorneys for Said Appellees.

APPENDIX A.

Excerpt from *United Electrical etc. Workers v. I. B. of E. Workers,* 115 F. (2d) 488:

"This is an appeal from a judgment dismissing a complaint for insufficiency on its face and must therefore be decided solely upon its allegations. The complaint alleged that the plaintiff was an unincorporated labor union whose members are engaged in producing electrical machinery and the like, and which had been chosen as collective bargaining representative 'by numerous employees,' and certified by the National Labor Relations Board 'on numerous occasions'; so that now it is the representative 'of the majority of employees in the said industry and certified as such in a vast majority of the cases wherein such disputes had arisen'. The defendant, International Brotherhood, is also an unincorporated labor union whose members are engaged 'primarily * * * in the installation of electrical equipment'. Two other defendants are locals of the Brotherhood, and all the corporate defendants except the National Electric Products Corporation are 'engaged in the handling and installing of electrical machinery'; the National Electric Products Corporation is a manufacturer of such machinery. *All the defendants have conspired 'to deprive the plaintiff of the right conferred upon and guaranteed to it' by the National Labor Relations Act,* 29 *U. S. C. A. Sec.* 151 *et seq.,* 'as the representative of its members and other workers in the said industry for collective bargaining.' To carry out this conspiracy the defendants agreed among themselves and with others; (a) 'not to allow' the plaintiff's members and other workmen 'to freely choose their own representatives for the purpose of bargaining collectively * * * but to coerce them

to designate' the Brotherhood, or its creatures; (b) to prevent members of the Brotherhood from installing any electrical machinery made by workmen who had chosen the plaintiff as their bargaining representative; and (c) to notify all employers that unless they refused to bargain collectively with the plaintiff when it was chosen as bargaining representative, they would not install the products of these employers and would prevent their installation. That, further to carry out the conspiracy the defendants (d) boycotted all products made by these employers, among which were those made by the plaintiff's members employed in shops in which it had been chosen the bargaining representative; and (e) had notified 'all dealers and jobbers in electrical machinery' of the boycott, because of which many of those notified stopped handling such products."

* * * * * * * *

"We hold that the plaintiff has no recourse to any court for the loss of its members; that may, or may not be so. But if it has, the suit does not 'arise under the * * * laws of the United States', the only basis of jurisdiction here put forward; its gravamen must be a violation of the law of a State. But Sec. 7 does not protect a union against that kind of wrong committed by a competing union except as an incident to the determination by the Board of its right to act as a bargaining representative."

APPENDIX B.

Excerpt from *General Committee etc. v. Mo.-K.-T. R. Co.*, 320 U. S. 323, 88 L. Ed. 76:

"It is true that the present controversy grows out of an application of the principles of collective bargaining and majority rule. *It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts.* It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority. In the *Brotherhood of R. & S.S. Clerks* case and in the *Virginian R. Co.* case, the Court was asked to enforce statutory commands which were explicit and unequivocal. But the situation here is different. Congress did not attempt to make any codification of rules governing these *jurisdictional controversies.* It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from an overlapping of the interests of two or more crafts. It established the general principles of collective bargaining and applied a command or prohibition enforcible by judicial decree to only one of its phases. The contention, however, is that the rule which Congress intended to govern can be found from the implications of the Act. Thus it is argued that the reasons which support the holding in the *Virginian R. Co.* case that the right of majority craft representation is exclusive also suggest that Congress intended to write into the Railway Labor Act a restriction on the rules and working conditions concerning which the craft has the right to contract. It

is pointed out that if the jurisdiction of a craft within which the exclusive right may be exercised is not limited, then disputes between unions may defeat the express purposes of the Act. In that connection reference is made to the statement of this Court in the *Virginian R. Co.* case (300 U. S., p. 548, 81 L. ed. 799, 57 S. Ct. 592) that the Act imposes upon the carrier 'the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.' That expresses the basic philosophy of Sec. 2, Ninth. But the decision does not imply, as is argued here, that every representation problem arising under the Act presents a justiciable controversy. *It does not suggest that the respective domains for two or more overlapping crafts should be litigated in the federal district courts.*

It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which it codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of Sec. 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. H. Rep. No. 1944, *supra,* p. 2; S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3. However wide may be the

range of jurisdictional disputes embraced within Sec. 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left the group of disputes to the National Mediation Board. If the present dispute falls within Sec. 2, Ninth, the administrative remedy is exclusive. If a narrower view of Sec. 2, Ninth is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else is left to those *voluntary processes* whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.

In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. *There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized.* But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d Cong., 2d Sess., p. 2. Courts should not rush in where Congress has not chosen to tread.

We are here concerned solely with legal rights under this Federal Act which are enforcible by courts. For unless such a right is found it is apparent that that is not a suit or proceeding 'arising under any law regulating commerce' over which District Court had original jurisdiction by reason of Sec. 24(8) of the Judicial Code, 28 U. S. C. A., Sec. 41(8), 7 F. C. A., Title 28, Sec. 41(8). [Citing cases.] When a court has jurisdiction it has of course 'authority to decide the case either way.' The *Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 57 L. ed. 716, 717, 33 S. Ct. 410. But in this case no declaratory decree should have been entered for the benefit of any of the parties. Any decision on the merits would involve the granting of judicial remedies which Congress chose not to confer."

APPENDIX C.

Excerpt from *American Federation of Labor v. J. Tom Watson,* 90 L. Ed., Advance Sheet No. 11, pp. 718-22:

"The initial question is whether the District Court had jurisdiction as a federal court to hear and decide merits. The federal district courts had jurisdiction of all suits of a civil nature, at common law or in equity where the matter in controversy exceeds, exclusive of interest and costs, $3,000 and 'arises under the Constitution or laws of the United States.' Judicial Code, Sec. 24(1), 28 U. S. C. A., Sec. 41(1), 7 F. C. A., Title 28, Sec. 41(1)."

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"The District Court held it had jurisdiction under Sec.. 24(1) of the Judicial Code. *None of the parties challenges that finding here.* The District Court also held that it had jurisdiction under Sec. 24(14) of the Judicial Code, 28 U. S. C. A., Sec. 41(14), 7 F. C. A. Title 28, Sec. 41(14). That provision gives the district courts of the United States jurisdiction over suits brought under the Civil Rights Act without allegation of any jurisdictional amount. [Citing cases.] We do not pass on the question whether the District Court had jurisdiction under Sec. 24(1) or Sec. 24(14) of the Judicial Code. For it is the view of a majority of the Court that jurisdiction is found in Sec. 24(8) of the Judicial Code, 28 U. S. C. A., Sec. 41(8), 7 F. C. A., title 28, Sec. 41(8) which grants the federal district courts jurisdiction of all 'suits and proceedings arising under any law regulating commerce.' As we have said, the bill alleges a conflict between the Florida law and the National Labor Relations Act. The theory of the bill is that labor unions, certified as collective bargaining representatives of employees under

that Act, are granted as a matter of federal law the right to use the closed-shop agreement or, alternatively, that the right of collective bargaining granted by that Act includes the right to bargain collectively for a closed shop. Whether that claim is correct is a question which goes to the merits. It is, however, a substantial one. And since the right asserted is derived from or recognized by a federal law regulating commerce, a majority of the Court conclude that a suit to protect it against impairment by state action is a suit 'arising under' a federal law 'regulating commerce.'" [Citing cases.]

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"But even though a district court has authority to hear and decide the case on the merits, it should not invoke its powers unless those who seek its aid have a cause of action in equity. [Citing cases.] The power of a court of equity to act is a discretionary one. *Pennsylvania v. Wililiams,* 294 U. S. 178, 185, 79 L. Ed. 841, 847, 55 S. Ct. 380, 96 A. L. R. 1166. Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent.'" [Citing cases.]

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"As we have said, the District Courts passed on the merits of the controversy. In doing so at this stage of the litigation, we think it did not follow the proper course. The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning."